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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re R.C., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R.C.,

Defendant and Appellant.

E054968

(Super.Ct.No. J240591)

OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas S. Garza,
Judge. Affirmed as modified.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant R.C. (Minor) appeals from the juvenile court's order declaring him a ward of the court and ordering him home on probation with various terms and conditions after finding that he committed residential burglary. (Pen. Code, § 459.) The proceedings arose out of an incident in September 2011, when Minor, then 17 years old, was seen walking out of his neighbor's house without permission; he then confessed to entering the home to steal items and taking a cellular telephone, cash, and a digital camera.

On appeal, Minor challenges two conditions of his supervised probation on constitutional grounds. He argues these conditions must be modified because they are unconstitutionally vague and/or overbroad. We agree, and will order the conditions modified.

DISCUSSION

Minor challenges two of his drug-related probation conditions. These conditions require Minor to: (1) "Not associate with any personally known user or seller of controlled substances or be in a location known by the probationer to be a place where controlled substances are used or sold" (condition No. 9); and (2) "Neither use nor

possess any drug paraphernalia as described in Health and Safety Code Section 11014.5 or Health and Safety Code Section 11364.5(d)” (condition No. 11).¹

According to Minor, condition No. 9, prohibits him from associating with people who legally use or possess controlled substances, such as pharmacists, or being in places where commonly prescribed narcotics are sold or administered, such as pharmacies or hospitals. Minor also argues that condition No. 11 prohibits him from “possessing or using implements that may be necessary for taking prescription medications.” Quoting this court in *In re Byron B.* (2004) 119 Cal.App.4th 1013, 1018 [Fourth Dist., Div. Two], he further maintains that the challenged conditions are not ““described with a “reasonable degree of certainty” . . . so that “ordinary people can understand what conduct is prohibited.””” Minor requests this court modify condition No. 9 to “only apply to illegal or illegally obtained controlled substances,” and condition No. 11 to exclude “drug paraphernalia that is possessed or used to administer prescribed medications.”

As a threshold matter, we note neither Minor nor his counsel objected to these particular conditions at the dispositional hearing. Minor’s failure to object in this case, however, does not result in a forfeiture of his claims. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887 [“a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing

¹ We note that condition No. 10 also requires Minor to “Not use nor possess any controlled substance or toluene-based substances without medical prescriptions and shall notify the probation officer of prescription medication.” Minor is not challenging this condition.

record developed in the trial court *can* be said to present a pure question of law” and not subject to forfeiture even if raised for the first time on appeal].)

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Ibid.*) If a reviewing court concludes on the merits that a probation condition is unconstitutionally vague and/or overbroad in its literal wording, the reviewing court may modify the condition so as to render it constitutionally sound. (*Id.* at pp. 878, 892.)

In this case, condition No. 9 is not sufficiently precise to inform Minor of what is required of him or to allow the court to determine when a violation has occurred. The vagueness in condition No. 9 lies in the possibility Minor could be deemed to be in violation of his probation for going to places such as hospitals and medical clinics where users of legally prescribed medications containing narcotics or controlled substances congregate. There are also many other places where controlled substances are legally sold—drug stores, supermarkets, club stores, and pharmacies. Further, many people have prescriptions for controlled substances, and are thus legally entitled to use them. The state has a compelling interest in preventing Minor from associating with the illegal use

of controlled substances, but that interest is substantially diminished regarding associating with the legal use or sale of controlled substances.

Likewise, the ambiguity in condition No. 11 might, in certain circumstances, render it difficult for Minor to know what is required of him, and for his probation officer and the court to know whether Minor has violated the terms of his probation. Condition No. 11 prohibits Minor from using or possessing “any drug paraphernalia as described in Health and Safety Code Section 11014.5 or Health and Safety Code Section 11364.5(d).” Both of these statutes define “drug paraphernalia” as “all equipment, products and materials of any kind which are designed for use or marketed for use, in . . . injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance” (Health & Saf. Code, §§ 11014.5, 11364.5, subd. (d).) The vagueness in condition No. 11 lies in the possibility Minor could be in violation of his probation if he used drug paraphernalia for a medical prescription, such as an inhaler for asthma or a hypodermic needle for diabetes. Again, the state has a compelling interest in preventing Minor from using or possessing drug paraphernalia associated with the illegal use of controlled substances, but that interest is substantially diminished regarding the use or possession of drug paraphernalia used or possessed to administer prescribed medication.

The People argue that modifying condition No. 9 is unnecessary because “the concept of illegality is implied,” and thus it is unlikely “any reasonable person would misunderstand or misapply the term” controlled substances. In regard to condition No. 11, the People assert, “No trial court would consider the situation of possessing an item necessary to take a prescribed medication, of which his probation officer was

notified, to be a violation of his probation term.” However, Minor is entitled to a condition of probation leaving no doubt as to what is either required or prohibited and not to rely on a favorable interpretation from his probation officer or the court.

Accordingly, we shall modify the challenged probation conditions.

DISPOSITION

Probation condition No. 9 is modified to read: “Not associate with any known user or seller of an illegal controlled substance or be in a location known by the probationer to be a place where illegal controlled substances are used or sold.”

Probation condition No. 11 is modified to state: “Neither use nor possess any drug paraphernalia as described in Health and Safety Code Section 11014.5 or Health and Safety Code Section 11364.5(d), except for drug paraphernalia that is used or possessed to administer prescribed medication.”

As modified, the judgment is affirmed. The juvenile court is directed to correct its disposition minute order to reflect these modifications.

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RAMIREZ

P. J.

We concur:

KING

J.

MILLER

J.